(1) Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

THERESA M. BEY,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, and STEPHEN PORTCH, in his official capacity as Chancellor of the Board of Regents,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Appeal Court decision in this case is contrary to the United States Supreme Court decision in *Reeves v. Sanderson Plumbing* on whether the Petitioner's opposing facts show that Respondent's non-discriminatory reason was false and without credence and should go to the jury for determination.

2. Whether Petitioner showed sufficient legitimate inferences to establish that Respondent's non-discriminatory reason is pretextual which is sufficient for the Court to deny Respondent's summary judgment.

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"*The principal standard should always be quality, rather than quantity.*" 1992 Page 7 (3rd Paragraph); 1993 Page 7 (2nd Paragraph) Section title — The Standard 14

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals and the Eleventh Circuit District Court in this case.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals reported No. 99-10988-II (11th Cir. June 13, 2000), and is reported in the (App. D). The opinion of the three-judge panel of the Court of Appeals is reported No. 99-10988 (11th Cir. April 14, 2000), Do Not Published (App. A). The opinion of the District Court in this case is reported No. 1:97-CV-1630-ODE (N.D. Ga., March 31, 1999), (App. B). The Magistrate Judge R&R in this case are reported No. 1:97-CV-1630-ODE (N.D. Ga., March 4, 1999) (App. C).

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on April 14, 2000. (App. A). The Court of Appeals entered an order denying time petition for rehearing on June 13, 2000 (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e, *et seq*.

STATEMENT OF THE CASE

A. Introduction and Background

Petitioner, Theresa M. Bey, an African American female received a Ph.D. degree in Educational Administration from the Univ rsity of Illinois in 1979. Dr. Bey became an assistant professor at East Texas State University, now known as Texas A&M University in 1979. (Defs.' Facts at 2.) She was awarded tenure as an associate professor at East Texas State in 1986. The Board of Regents of the University System of Georgia ("Board of Regents") recruited and hired petitioner as an associate professor in the Department of Curriculum and Supervision in the College of Education at the University of Georgia ("UGA") in July 1987. (Defs.' Facts d 1; Defs.' Exs. 9. 20). Petitioner was hired as an associate professor, rather than an assistant professor, in recognition of her scholarly work and experience. Dr. Bey began teaching at UGA in the 1987-88 academic year.

Petitioner requested tenure consideration in 1991. Dr. Thomas Holmes, Acting Department Head at the time, instructed her to wait. (App. C at 24a.). The new Department of Educational Leadership in the College of Education at UGA, a unit combining the Department of Education Administration and the Department of Curriculum and Supervision that employed Dr. Bey. (Defs.' Facts d 4). The white senior male faculty in the new department supported the one white female assistant professor for tenure and denied the Petitioner's request. (Bey Depo. p.105, 17-21). Petitioner was not considered with the white female who was employed two years after Petitioner.

Petitioner's initial tenure consideration was held in May 1992. Ballots resulted in 7 "yes" and 7 "no" votes, with one abstention. Only two of the four necessary external evaluation letters had been received by the time of the vote. (App. C at 25a). The faculty voted in June 1992 to purge the record of the May vote and to conduct another vote in the Fall after all the letters from the external evaluators had been received. (Defs' S.J Ex. 9). On July 1, 1992, Dr. Edward Pajak, a white male, became Department Head. Prior to that time, petitioner had three different department heads. (App. C at 24a). During this time period, one Department Head failed to conduct an annual review required by the University of Georgia Guidelines for Appointment, Promotion, and Tenure ("Guidelines"). (App. E at 50a). All annual reviews written in the first five years did not advise Petitioner or indicate any concerns regarding her progress toward tenure. (Defs.' Ex. 20).

A departmental vote on petitioner's tenure in the Fall of 1992, resulted in 4 "yes" and 8 "no" votes. Dr. Pajak informed Petitioner of results and wrote her a letter identifying concerns expressed by some of the faculty: (1) lack of evidence of continued active and productive scholarship, (2) insufficiently strong record of exemplary performance in areas assigned, and (3) continuing and long-range programmatic contributions to the department. (App. C at 26a).

The Petitioner appealed the negative decision to the Vice President for Academic Affairs and ultimately to the President of UGA, Dr. Charles Knapp. (Defs.' Ex. 29). He acknowledged inadequacies in Petitioner's periodic advisement and remanded her appeal to the Vice President of Academic Affairs with instructions that the Department afford Petitioner sufficient research time to allow her an

opportunity to attain an acceptable level of research productivity. (Defs.' Facts ¶ 13; Pl.'s Resp. ¶ 13; Defs.' Exs. 11, 12).

The Petitioner's appeal to President Knapp also resulted in the tenured faculty holding a meeting to discuss ways for Dr. Bey to optimize her chance for tenure. The faculty recommended a plan for Petitioner that added a new research focus and more publications. (Defs.' Facts ¶ 14; Pl.'s Resp. ¶ 14; Defs.' Ex 13). On January 12, 1993, Petitioner met with Dr. Pajak to discuss the plan to provide time for research and writing. (Defs.' Ex 13). A written plan included reduction of Petitioner's class load, assignment of a graduate assistant, and assistance and input from other faculty on her quality and quantity of publications. The plan also set up a schedule for periodic meetings between Dr. Pajak and Petitioner. (Defs.' Facts ¶ 14; Pl.'s Resp. ¶ 14; Defs.' Ex 13; Pajak Dep. at 61). In August 1993, a new application for tenure was due.

The 1993-94 academic year was Petitioner's seventh year as a non-tenured professor. The UGA Guidelines as well as the Board of Regents Policy 803.09(F) specify that the maximum time that may be served at the rank of assistant professor or above without the award of tenure shall be seven years. (Defs.' Facts ¶ ¶ 16, 18; Defs.' Ex 6 ad 27; Defs.' Ex. 7). The Board of Regents Policy 803.06(B)(2)(c), requires that notice of intent for the following academic year be provided at least nine months prior to the date of termination of the current contract. (Defs.' Facts 17; Ex. 14 at 2). The Board of Regents did not meet this requirement. Petitioner received a hand-delivered letter from Dr. Alfonso Buccino, College of Education Dean on September 21, 1993, to notify her that the contract would

not be renewed for the 1994-95 academic year. Petitioner signed and dated the letter on September 21, 1993 that had a back date for August 30, 1993. (Defs' Ex 14). After signing the letter of notification on September 21, 1993, Petitioner received a follow-up letter from the Dean dated September 15, 1993, indicating that her non-renewal status may change as a result of the tenure process being under way. A copy of the letter was forwarded to Dr. Pajak. (Defs.' Ex 15).

Petitioner's tenure vote on September 29, 1993, was 6 "yes" and 8 "no". (Defs.' Facts ¶ 19; Defs.' Ex 16). Of the fourteen faculty voting, twelve were white males, one white female, and one black female. (Defs.' Facts ¶ 19; Defs.' Ex 29). Dr. Pajak's letter informing Petitioner of the vote used the same concerns expressed in his letter after the vote in September 1992. (Defs.' Facts ¶ 19; Pl.'s Resp. ¶ 19; Defs.' Exs. 29, 16). However, these concerns were not shared by the entire faculty, as demonstrated by a letter from a voting member, Dr. Beverly Lindsay, to the EEOC stating that several faculty members found the quality of the Petitioner's work meritorious of tenure. (Defs.' Facts ¶ 22; Defs.' Ex. 28). In a reconsideration vote taken on October 21, 1993 the outcome was 5 "yes" and 7 "no" with twelve of the fourteen faculty members casting ballots. (Defs.' Ex 29). The Department Head, Dr. Pajak, voted in favor of and supported Petitioner's bid for tenure in 1992 and 1993. (Defs.' Facts ¶ 6).

Petitioner appealed the Department's 1993 decision not to recommend her for tenure. (Defs.' Facts ¶ 23; Defs.' Exs. 17, 18, 21). On February 21, 1994, President Knapp advised Petitioner that he was upholding the decisions of both the Department of Educational Leadership and the University Appeals Committee denying her tenure

application. (Defs.' Ex. 22). The President of UGA may reverse negative recommendations for tenure applicants. (Knapp Depo. pp. 12: 15-23, pp. 13:1-9). Petitioner filed an appeal with the Board of Regents and was notified by letter dated April 13, 1994, that the Board had declined to grant her application for review. (Defs.' Facts ¶ 23; Defs.' Exs. 23, 26).

In May of 1994, the President of UGA was notified by the Council of International Exchange of Scholars that Petitioner had been awarded a Senior Fulbright Scholarship to lecture and conduct research in Cyprus for the 1994-95 academic year. (Defs.' Facts ¶ 24; Defs.' Ex. 27). On June 28, 1994 plaintiff filed a charge of discrimination, alleging the decision to deny her application for tenure was discriminatorily based on her race and sex. (Defs.' Facts ¶ 25; Defs.' Ex. 1).

B. Proceedings Below

Theresa M. Bey, Ph.D, filed a complaint against The Board of Regents of the University System of Georgia, and Stephen Portch, in his official capacity as Chancellor of the Board of Regents, in the United States District Court for the Northern District of Georgia, Atlanta Division on June 5, 1997. She alleged a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, seeking compensatory damages, reinstatement with tenure and all advancements, plus relief as deemed proper.

The District Court Magistrate Judge R&R dismissed Dr. Bey's claim under Rule 56(b) of the Federal Rules of Civil Procedure on March 4, 1999. The Magistrate Judge found that Plaintiff met her burden of establishing a *prima facie*

case of race discrimination, but failed to present facts raising a genuine issue of material fact that Defendant's legitimate non-discriminatory reason for denying Plaintiff tenure was pretextual. In conclusion the Magistrate Judge recommended that all defendants be Granted summary judgment as to plaintiff's race and sex discrimination claims under Title VII. The decision also recommended that plaintiff's state law claims be Dismissed without prejudice. On March 31, 1999 the District Judge concurred with the Magistrate Judge's ruling.

On April 14, 2000 a three-judge panel in the Eleventh Circuit Court of Appeals ruled that (1) Dr. Bey failed to establish a *prima facie* case for sex discrimination; and (2) she did establish a *prima facie* case for race discrimination but failed to demonstrate that the Board's legitimate reason for denial, that she had not produced a sufficient quality and quantity of scholarly work to merit tenure was pretextual. The Eleventh Circuit concluded that no reasonable jury could find by a preponderance of the evidence adduced by Dr. Bey that the Board's proffered legitimate business reason was a pretext.[1] The Petition for Rehearing denied by the Eleventh Circuit Court of Appeals on June 13, 2000.

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1. The April 2000, Eleventh Circuit Court of Appeals three-judge panel decision included a [DO NOT PUBLISH] statement.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT THE PETITION BECAUSE THE PETITIONER HAS PROVIDED SUFFICIENT LEGITIMATE INFERENCES TO ESTABLISH THAT RESPONDENTS' NON-DISCRIMINATORY REASON IS PRETEXTUAL AND SHOULD GO TO THE JURY FOR DETERMINATION.

The Respondents had no right to apply the University of Georgia Guidelines for Appointment, Promotion, and Tenure ("Guidelines") fairly to all faculty members and not to Petitioner unless there are plausible nondiscriminatory reasons for not applying the Guidelines fairly to Petitioner. An absence of such reasons, in itself, is evidence of pretext. The Respondents have already set a precedent when there was a finding of discrimination for a violation of the Guidelines in a tenure action. Tenure was granted to a faculty member when Respondents violated tenure Guidelines.[2]

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2. Violation of disparate treatment taken from the 41 C.F.R. Ch 60-3-11 Office of Federal Contract Compliance programs, Equal Employment Opportunity, Department of Labor, Uniform guidelines on employee selection procedures (1978). An example on how it is applicable to Respondents is that there was a Conciliation Agreement between the US Department of Labor Office of Federal Contract Compliance Programs and The University of Georgia, Athens, Georgia stated on page 3, number 3 Violation: OFCCP has alleged that during Fiscal Year 1992, there was disparate treatment in the administration of the University's tenure guidelines that adversely affected a female faculty member, in the Department of Marketing and Distribution, College of Business. OFCCP's review revealed that this employee was treated differently than a male faculty in the Department with similar backgrounds in the application of the (Cont'd)

Respondents violated their own Guidelines, which was discriminatory in application in regards to Petitioner.

In light of *Reeves v. Sanderson Plumbing Products Inc.*, No. 99-536, 2000 WL 743663, the court should vacate the judgment and remanded to the United States District Court, Eleventh Circuit for the Northern District of Georgia, Atlanta Division for a jury trial.

A. Respondents were not entitled to a motion for summary judgment as a matter of law.

Based on Dr. Bey's pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and all other documentation, Dr. Bey has established a *prima facie* case of race under Title VII with supporting evidence of legitimate inferences to find that the Respondent's justification is false and or without credence. Dr. Bey and the Respondents have opposing facts and witness facts that must go to the jury. There are genuine issues of material facts and therefore, this case was not ripe for Summary Judgment.

(Cont'd)
Guidelines for Appointment, Promotion and Tenure dated May 1992. This faculty member was denied tenure in her seventh year, November 1992, at the University, and was issued a letter on non-renewal. (Employee Number 5 on Attachment A.) The alleged failure of UGA to uniformly apply its policies and procedures equally to female and male faculty members is a violation of 41 C.F.R. 60-1.4(a). Remedy: Effective August 10, 1993, UGA granted tenure to and promoted Employee five. In the Agreement the female's salary was adjusted . . . UGA agreed to develop and implement a system, within 60 days of the date of Agreement, to monitor the tenure process and thus ssure similar problems do not recur.

The standard for summary judgment under Rule 56 is that court must review all of the evidence in the record, *cf., e.g., Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), drawing all reasonable inferences in favor of the non-moving party, but making no credibility determinations or weighing any evidence, *e.g., Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555 (1990). The latter functions, along with the drawing of legitimate inferences from the facts, are for the jury, not the court. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. *Reeves v. Sanderson Plumbing*, pp. 14-16.

The Eleventh Circuit also states that a court may not weigh evidence to resolve a factual dispute; if a genuine issue of material fact is present, the court must deny summary judgment. *Hutcherson v. Progressive Corp.*, 984 F.2d 1152, 1155 (11th Cir. 1993). Likewise, if reasonable minds could differ on the inferences arising from undisputed facts, then the court should deny summary judgment. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992). On a summary judgment motion, the record and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the non-moving party. *McCabe v. Sharrett*, 12 F.3d 1558, 1560 (11th Cir. 1994).

B. Unlawful Employment Discrimination Based On Title VII.

Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The Plaintiff has the burden of persuading the factfinder that the defendant intentionally discriminated against her. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). The allocation of burdens were established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973), as follows: (1) the plaintiff has the burden of establishing a prima facie case of discrimination; (2) once the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the action taken against the employee; and (3) if defendant carries this burden, plaintiff must have an opportunity to show that the legitimate reason offered by defendant was a pretext for discrimination.

A Plaintiff may establish a *prima facie* case of discrimination by presenting any of three types of evidence; (1) direct evidence of discriminatory intent; (2) statistical evidence of disparate treatment; or (3) circumstantial evidence meeting a test similar to that set out in *McDonnell Douglas*. *Holifield v.Reno*, 115 F.3d 1555, 1561-62 (11th Cir. 1997); *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989). Plaintiff has presented statistical and circumstantial evidence in this case. The plaintiff's evidence pertains specifically to race discrimination.

The Courts below determined that Petitioner met the *prima facie* case for race discrimination. (*See* District Judge Order p. 9, ¶ 1; Appeals Court Decision p. 2; App. 1b; 10a). Therefore, this issue will not be discussed.

II.

THE TOTAL RECORD OF DR. BEY PRESENTED SUFFICIENT LEGITIMATE REASONS FOR A TRIER OF FACT TO DISBELIEVE THE RESPONDENTS' NON-DISCRIMINATORY REASON FOR ITS DECISION IS SUFFICIENT AS A MATTER OF LAW TO INFER INTENTIONAL DISCRIMINATION.

The Supreme Court in *Reeves v. Sanderson Plumbing*, has recently held that a *prima facie* case of discrimination, combined with sufficient evidence of pretext, is sufficient as a matter of law to show intentional discrimination. *See Reeves*, 2000 WL 743663, at *9. "Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Hardy v. S.F. Phosphates L.C.*, 185 F.3d 1076, 1080 (10th Cir. 1999) (further quotation omitted).

A Plaintiff may demonstrate pretext by showing "either that a discriminatory reason more likely motivated the employer's proffered explanation or . . . that the employer's proffered explanation is unworthy of credence." *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1317 (10th Cir. 1999). (internal quotation omitted) (alteration in original). "[T]he pertinent question in determining pretext is not whether the employer was right to think the employee engaged in misconduct, but whether that belief was genuine or pretextual." *See Hardy* at 1080. A *prima facie* case of discrimination, combined with sufficient evidence for a trier

of fact to disbelieve the Defendant's legitimate, nondiscriminatory reason for its decision, is sufficient as a matter of law to show intentional discrimination. *See Reeves* at *8.

The court should review all of the evidence in the record. *See Reeves* at *10. All reasonable inferences are drawn in favor of the nonmoving party and this court does "not make credibility determinations or weigh the evidence." *Id.* at *11. Judgment as a matter of law is appropriate " 'only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position.' " *Finley v. United States*, 82 F.3d 966, 968 (10th Cir. 1996) (citation omitted).

The Courts below stated that Dr. Bey need only raise a genuine issue of material fact that the reason was a pretext; she does not need to actually prove it. (Distinct Judge Order p. 9. App. 11a). *Maddox v. Proctor & Gamble Company, Inc.*, 107 F.3d 846, 851 (11th Cir. 1997).

Respondents asserted that a majority of the tenure review committee voted to deny Dr. Bey's application for tenure because she had not produced a sufficient quality or quantity of scholarly work. (Defs.' Br. Ad 8; Defs.' Ex. 20). This is Respondents' nondiscriminatory reason for the denial of Dr. Bey's tenure application. (App. B at 13a).

A. Opposing Facts

Below are numerous examples listed from 1 through 19 of opposing facts that are sufficient legitimate inferences to establish that Respondent's nondiscriminatory reason is pretextual and that these are material issues of facts that

should go to the jury and not the court for determination. *Bhamini M.P. Nayar, H.D. v. Howard University*, 881 F. Supp. 15; 1995, US Dist. Lexis 4243 (March 17, 1995 decided, March 20, 1995 filed).

1. The UGA Guidelines for Appointment, Promotion, and Tenure ("Guidelines") must apply Guidelines with fairness. Fairness means that the procedures for recommending a candidate's appointment, promotion, and tenure must include safeguards against error. (Guidelines 1992 & 1993 p. 2, ¶ 2).

The Guidelines[3] state that the principal standard should always be quality, rather than quantity. Respondents' reason of Dr. Bey not having sufficient quantity of work is inconsistent with the Guidelines. The Respondents policy further does not indicate that a faculty must have recent publications or how many publications within a given period. Respondent had no right to apply the Guidelines to all the faculty members where there is no quantity requirement for work and not Dr. Bey, the other faculty member, unless there are plausible non-discriminatory reasons for saying that Dr. Bey did not have a sufficient quantity of work. An absence of such reasons, in itself, is evidence of pretext. Therefore, this is a false non-discriminatory reason.

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3. UGA Guidelines for Appointment, Promotion and Tenure state that " Faculty whose work assignments include research or other creative activities should clearly *demonstrate high quality* in these endeavors. The University distinguishes between the routine and the outstanding as judged by the candidates' peers at the University of Georgia and elsewhere. "*The principal standard should always be quality, rather than quantity.*" 1992 Page 7. (3rd Paragraph); 1993 Page 7 (2nd Paragraph) Section title — The Standard; emphasis add.

In regard to Dr. Bey's quality of work, Respondents policy sets no scale of measurement of criteria for what Respondents considers "High Quality". Also, there is no uniform testimony as to what constitutes high quality. Respondents had no right to apply the Guidelines for high quality of work to all the faculty members where there are no measurements or criteria and not Dr. Bey, the other faculty member, unless there is plausible non-discriminatory reasons for saying that Dr. Bey did not have a sufficient quality of work. An absence of such reasons, in itself, is evidence of pretext.

The tenure voting faculty standard for high quality for Dr. Bey was that the "faculty were expressing a view of research that was very narrow, . . . in publishing in a high-quality journal and publishing in the journals that they published in". (Pajak Depo. p. 75 at 12-16). This standard came from an all white male faculty, because the court noted that " Dr. Lindsay stated in her response to the EEOC that Petitioner's dossier was comparable to other University faculty who have been granted tenure"; that her publications "clearly attest to her scholarly expertise"; and that "her work merits the granting of tenure." (Defs.' Ex 28 ¶ 3). Therefore, this standard by the white male faculty is discriminatory.

2. Dr. Bey met the criteria for submittal of her tenure application with the number of published articles which was five, and two of the five were with tenured professors in her Department. However, Dr. Bey had to publish articles above and beyond the requirement of the five articles required for the application. The additional articles were a pretext to unlawful discrimination, in that the faculty knew that it was impossible for Dr. Bey to complete their unusual and unreasonable request. Dr. Pajak stated, "the faculty said,

" they'd like to see three or four publications," and I thought . . . frankly . . . that was unrealistic and would be very difficult to do." (Pajak Depo p. 61 at 11-14). Adding the requirement of three or four additional articles for Dr. Bey to obtain tenure and not other faculty that submitted a tenure application was unlawful discrimination.

3. Two white tenured faculty members were a married couple and it is a strong presumption that the husband influenced his wife's vote regarding Dr. Bey. Therefore, the votes against Dr. Bey were all white males and they directed Dr. Bey to publish three or four additional articles and to conduct research in the area of Multicultural Education, which was unlawful discrimination based on race. (Pl's Ex 20). Dr. Bey indicated that she was not in total agreement with going in the area of Mutliculturalism. (Bey Depo. p. 142 at 10). Dr. Bey should have been applying for tenure based on her own work in the past five years, which was the mentoring of teachers. It is a presumption that this area of work was not viewed as an interest to the white males. The tenured faculty violated academic freedom.

The Guidelines states that "It serves society's aspiration that scholars should have freedom to say and write what they think." (1992 Guidelines p. 29, ¶2). The white male faculty requested that Petitioner "publish in a high-quality journal and publishing in the journals that they published in." (Pajak Depo. p. 75 at 14-15). There is a strong presumption that the standard for high quality is publishing in the same journals as the white tenured faculty. Respondents have no right to consider the publications of white males as high quality and not Dr. Bey's, unless there are plausible non-discriminatory reasons for not considering Dr. Bey's publications as high quality. An absence of such

reason, in itself, is evidence of pretext. These are opposing facts that must go to the jury. Therefore, this is a genuine issue of material fact that must be determined by the jury and not the court. (*Maddox*, *supra*, at 851; *Reeves*, *supra* at 10-11).

4. Dr. Beverly Lindsay, a black female, expressed that Dr. Bey's work was exemplary. (Defs.' Ex 28 ¶ 3). The Court noted that Dr. Lindsay also acknowledged that other faculty complained that Petitioners's "articles/publications were too short; they were works in progress; that she had not published in prestigious journals; that she had not published books." (Defs.' Ex. 28 ¶ 5). This is a false statement, because the tenured faculty wanted Dr. Bey to publish in journals that they published in which is discriminatory and in violation of the Guidelines. (Pajak Depo. p. 75 at 12-16; Guidelines 1992, p. 29 ¶ 2). These are opposing facts that must go to the jury. Therefore, this is a genuine issue of material fact that must be determined by the jury and not the Court. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11).

5. The Courts below pointed out that Respondents point to Petitioner's May 1992 evaluation by Acting Department Head, Dr. Thomas Holmes, stating that " Dr. Bey ranked below average among the departmental faculty in indicators of research productivity" and "in the bottom quartile . . . in the indicators of instructional excellence." (App. C at 36a). There is a strong presumption that indicators of research productivity means quantity of work. No other definitions in the Guidelines describe indicators of research productivity any different. Therefore, Respondents reason of Dr. Bey not having sufficient quantity of work is inconsistent with the Guidelines. The Respondents' policy does not indicate that a faculty must have recent publications

or how many publications within a given period. Respondents have no right to apply the Guidelines to all the faculty members where there is no quantity requirement for work and not Dr. Bey, the other faculty member, unless there are plausible non-discriminatory reasons for saying that Dr. Bey did not have a sufficient quantity of work. An absence of such reasons, in itself, is evidence of pretext. Therefore, this is a false non-discriminatory reason.

6. The Court mentioned, "the statement that Dr. Bey ranked below the bottom quartile . . . in the indicators of instructional excellence is false." (Dist. Judge Order p. 11; ¶ 1) Dr. Bey was ranked in the superior and very good in the categories of instructional excellence. (Pl's Ex 27 p. 3). These are opposing facts that must go to the jury. Therefore, this is a genuine issue of material fact that must be determined by the jury and not the court.

7. The Courts below noted that "they were unpersuaded by Petitioner's allegation that her lack of scholarly productivity was a result of inadequate guidance". The Court also mentioned that plaintiff acknowledges that UGA had published Guidelines for promotion and tenure, and that she had access to those publications. (Magistrate Judge R&R, pp. 19- 20). Dr. Bey opposes the Magistrate's non-persuasion by stating that there has been evidence of procedural irregularities and inadequacies in my annual reviews and advisement. There have been three different Department Heads in my Department within the last five years. This inconsistency has failed to provide a base for documenting my exemplary performance. (Pl.'s Ex 9, ¶ 2). These are opposing facts that must go to the jury. Therefore, this is a genuine issue of material fact that must be determined by the jury and not the court. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11).

8. The Court noted that "the Guidelines provided that an associate professor "may request an annual review conducted according to the defined policy of the promotion/ tenure unit." (Pl.'s Ex D at 17; Defs.' Ex. 6 ad 16; Magistrate Judge R&R p. 5; District Judge Order p. 4). Petitioner never requested such an annual review. (Defs.' Facts ¶ 10; Defs.' Ex 20; Magistrate Judge R&R p.5; Dist. Judge Order p. 4). This is a false statement, because Dr. Bey's first employment contract was in 1987 with Respondent. She was under the 1988 Guidelines which state: "Every instructor, assistant professor, and associate professor should have an annual review of his or her progress toward promotion. This should be done in conjunction with the annual review of all faculty members." (1988 Guidelines p. 28, ¶ 5; App. E at 50a). These are opposing facts that must go to the jury. Therefore, this is a genuine issue of material fact that must be determined by the jury and not the court. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11).

9. The Courts below noted that Dr. Bey's application for tenure was considered in May 1992, at which time the tenured faculty voted 7 "yes" and 7 "no" with one abstention; however, only two of the four necessary external evaluations had been received by the time of the vote. (Defs.' Facts ¶ 8; Magistrate Judge R&R p. 4, ¶ 2; District Judge Order p. 3, ¶ 1). In June 1992, the faculty voted to purge the record of the May vote and to conduct another vote in the Fall after all the letters from the external evaluators had been received. (Defs.' Facts ¶ 8; Magistrate Judge R&R p. 4, ¶ 2; District Judge Order p. 3, ¶ 1). Dr. Holmes called for a tenure vote on Dr. Bey's tenure application when the file was not complete and there was a need for two more external evaluation letters. Dr. Holmes stated, "You can buy my vote." (Bey Depo. p. 121 at 8-13). This is a strong presumption

that the faculty vote was tainted and that the 7 "no" voters wanted to wait on the two external evaluations, because the application file was not complete.

10. When Dr. Holmes submitted the application for tenure for the white female it was complete. This was unlawful discrimination against the Petitioner, because the white female had a complete application when it was submitted to the faculty for a tenure vote. (Bey Depo. p. 105 at 17-21). Respondents had no right to submit one faculty member complete application for tenure and not Dr. Bey, the other faculty member, unless there is plausible non-discriminatory reasons for saying that Dr. Bey did not have a complete application for tenure. An absence of such reasons, in itself, is evidence of pretext. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11).

11. Dr. Holmes wrote a negative annual review of Dr. Bey that was not on the faculty evaluation form and without Dr. Bey's signature. (Defs.' Ex 5). Previous evaluations were on the faculty evaluation form and included Dr. Bey's signature and date. (Defs.' Ex. 5). Dr. Holmes wrote a negative annual review on May 21, 1992, and there is a strong presumption that he intentionally wrote this review shortly after calling for the May 1992 tenure vote. There is another presumption that his annual evaluation of Dr. Bey tainted the ultimate outcome of all subsequent tenure votes. This is an inconsistency in regard to Dr. Bey's annual reviews. Clearly, this is unlawful discrimination and these facts should go to the jury for determination. These are opposing facts that must go to the jury. Therefore, this is a genuine issue of material fact that must be determined by the jury and not the court. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11).

12. Respondents state that its reason for not granting Petitioner tenure is that "the concerns about the continuing and long-range programmatic contributions to the Department. (Magistrate Judge R&R p. 4 ¶ 2). Dr. Bey opposes this reason, because the Respondents misquoted the 1988, 1992, and 1993 Guidelines regarding this reason. The Guidelines state, "the University's continuing and long-range need for what the candidate for tenure may be expected to do. (Guidelines 1992 p. 29, par. 1). The Respondents continued to need what Petitioner was expected to do as a faculty member, because the Respondents hired new faculty to perform duties that Dr. Bey was doing. In addition, the Department was going through reorganization in 1992 and 1993. (Bey Depo. p. 157 at 1-15). Therefore, there is a strong presumption that tenured faculty did not know their long range programmatic contributions to the department. These are opposing facts that must go to the jury. Furthermore, this is a genuine issue of material fact that must be determined by the jury and not the Court. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11)

13. Respondents mentioned that the Petitioner had an insufficient record of exemplary performance in the assigned area of research. (Magistrate Judge R&R p. 4 ¶ 2). Dr. Bey co-authored with two of the tenured faculty members who voted and for the Department to make this claim, is to say that their own research is not an exemplary performance in the area. If Respondents indicate that Petitioner lacks the quality and quantity of research, then the Department members cannot say this without condemning themselves. Dr. Bey co-authored a research chapter with Dr. Carl Glickman in 1990 and co-edited books with Dr. Holmes in 1990 and 1992. (Pl's Ex 27). These are opposing facts that must go to the jury. Therefore, this is a genuine issue of

material fact that must be determined by the jury and not the Court. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11).

The Court noted that Dr. Lindsay pointed out that Petitioner had co-authored publications with Dr. Glickman and Dr. Holmes, both of whom had been granted tenure at UGA; stating that it was contrary to logic to view these publications favorably for the two (white) men while not viewing them favorably for plaintiff. (Magistrate Judge p. 21, ¶ 2). Neither Dr. Lindsay or Dr. Bey, however, provided the dossiers of Dr. Glickman and Dr. Holmes for a comparison of scholarly publications. Dr. Bey opposes this because it is not necessary to provide the dossiers of Dr. Glickman and Dr. Holmes for a comparison when Dr. Lindsay can give testimony to the fact in issue. (*See* Federal Rules of Evidence 701(b).

14. Respondents noted that Petitioner lacked evidence of continued active scholarship over the extended period of time that tenure supposes. (Magistrate Judge R&R p. 6 ¶ 1). This is a false statement because Dr. Bey received a Senior Fulbright Scholarship for the 1994-95 academic year. Dr. Bey published a book titled, "Making School A Place of Peace" and three articles following the Fulbright assignment. There is no requirement for the number of articles or books to be published per year or over a number of years in the Guidelines. The Courts below noted that Defendant's proffered legitimate, non-discriminatory reason for denying Petitioner tenure is that Petitioner had not produced a sufficient quality or quantity of scholarly work. (Defs'. Br. at 8; Defs.' Ex 20; Magistrate Judge R&R p. 16, ¶ 1; District Judge Order p. 11, ¶ 1). These are opposing facts that must go to the jury. Therefore, this is a genuine issue of material fact that must be determined by the jury and not the Court. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11).

15. Dr. Holmes, urged and assisted a white female who applied for tenure in 1991 and declined to accept Dr. Bey's request to submit a tenure application in 1991. (Bey Depo. p. 105, 17-21). Petitioner was employed by Respondents two years before the white female. Petitioner was instructed by a former Department Head to see Dr. Fred Carver, a senior tenured faculty member about preparing her tenure application. (Bey, Depo. p. 153, 5-11). Petitioner was asking for advice and assistance in 1991. This was unlawful discrimination on the part of the Respondents for not urging Dr. Bey to apply for tenure when Dr. Holmes had urged a white female. (Bey Depo. p. 105, 17-21). Respondents had no right to submit one faculty member for tenure and not Dr. Bey, the other faculty member, unless there are plausible non-discriminatory reasons for non-submittal. An absence of such reasons, in itself, is evidence of pretext. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11).

16. Respondents did not provide letter of termination in accordance with Guidelines. Petitioner received and signed an employment non-renewal letter on September 21, 1993. (Defs.' Ex 14). There is a clear indication that Respondents backdated the non-renewal letter for August 30, 1993. (Defs.' Ex 14). Later, Respondents submitted a follow-up letter to Petitioner that was backdated for September 15, 1993, indicating that the tenure process was underway and this second letter was clarification to the backdated letter of August 30, 1993. (Defs.' Ex 15). Respondents did not meet the nine month requirement stipulated in the Guidelines for all faculty. These are opposing issues of fact that should go to the jury. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11).

17. Dr. Pajak indicated that there are two tracks for tenure in the department. One track is teaching and research and the other track is for teaching and service. (Pajak Depo. p. 82 at 21-25; p. 83 at 1-9). Respondents reviewed Dr. Bey for teaching and research under the Guidelines criteria for tenure. Dr. Bey pursued the track that the tenured faculty did not consider under the Guidelines which was teaching and service. Dr. Pajak states, "that faculty were assigned teaching and public service." (Pajak Depo. p. 83 AT 1-5). This is a clear indication of the Respondents' poor documentation of Dr. Bey. This is contrary to Dr. Bey's annual reviews. (Defs.' Ex 5). For six years, Dr. Bey's annual review percentages were 50% teaching, 25% research, and 25% service and administration. (Defs.' Ex 5). To take the research (publication) route Dr. Bey would have had 75% publication and 25% teaching , service and administration. Respondents wanted Dr. Bey to perform teaching, research, service and administration without giving Dr. Bey the time to publish. Respondents made this research (publication) requirement at the last minute, which is contrary to what the Petitioner was doing for the past six years. These are opposing facts that must go to the jury. Therefore, this is a genuine issue of material fact that must be determined by the jury and not the court. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11).

Dr. Holmes indicated that Dr. Bey did not have the quantity of publications in her yearly evaluation, which does not indicate a budget time for research. This is clearly false. (Defs.' Ex 5). Dr. Bey percentages are based on teaching and service and not teaching and research. Dr. Pajak's 1994 evaluation of Dr. Bey states that "Dr. Bey ranked well above average in the area of service as compared to other members of the Department, especially in terms of her service to

professional organizations." These are opposing facts that must go to the jury. Therefore, this is a genuine issue of material fact that must be determined by the jury. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11).

18. Respondents reduced Petitioners course load and wanted to give her a graduate assistant and more time to publish in 1993. (Defs.' Ex 13). Teaching and research was not Petitioner's track from 1987 to 1992, because Petitioner was doing more service as her evaluations indicated. (Defs.' Ex 5). In the 1993-94 academic year Respondents were requiring Dr. Bey to go to a research (publication) track, because the Respondents reduced Dr. Bey's course load. (Pl's Ex.20). Respondents should have increased Dr. Bey's research time in the beginning of her employment, from 1987 to 1992, if they wanted her to come under the teaching and research track. Respondents did not change the percentages during the 1994 evaluation when Respondents reduced Dr. Bey's teaching time and increased her research time. Therefore, Dr. Ken Zeichner's external evaluation letter was correct and critical in accordance with Respondents' tenure Guidelines which state that evaluators must conduct a critical evaluation of the candidate's performance (*See* Guidelines 1992 & 1993 p. 39, App. C, Sec. 5: External Evaluations). Dr. Zeichner would have granted Dr. Bey tenure under the teaching and service track and he would not have evaluated Dr. Bey under research (publication) track. These are opposing facts that must go to the jury. Therefore, this is a genuine issue of material fact that must be determined by the jury. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11).

19. The Courts below mentioned that Defendant's statistics have little, if any, significance. (Magistrate Judge R&R, p. 19). Dr. Bey opposes the Court argument that the

statistics provided as evidence have little, if any, significance. The plaintiff may establish a prima facie case of discrimination under Title VII on the basis of statistical proof of a pattern of discrimination, *see Wilson v. AAA Plumbing Pottery Corp.*, 34 F.3d 1024, 1027 (11th Cir.1994). These are opposing facts that must go to the jury. Therefore, this is a genuine issue of material fact that must be determined by the jury. (*Maddox*, *supra*, at 851; *Reeves*, *supra*, at 10-11).

The opposing facts individually and in the aggregate provide sufficient legitimate reasons and or inferences to establish that the Respondents nondiscriminatory reasons were pretextual and creates a material issue of fact that should go to the jury and not the court.

Petitioner is contesting the judgment regarding cost. The Petitioner does not contest the dismissal without prejudice of her state law claims in the event that the Court adopts the recommendation that summary judgment should be granted as the Title VII claims. However, if the Court reverses the Appeals' Court decision, the state law claims should be reinstated to be tried along with the Petitioner's federal question claims.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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September 11, 2000

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 14, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10988

D.C. Docket No. 1:97-CV-1630-ODE

THERESA M. BEY,

Plaintiff-Appellant,

versus

THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, STEPHEN PORTCH, in his official capacity as Chancellor of the Board of Regents,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(April 14, 2000)

Before ANDERSON, Chief Judge, WILSON, Circuit Judge, and HILL, Senior Circuit Judge.

PER CURIAM:

This is an appeal from an order granting summary judgment to the Board of Regents on Title VII claims brought by Dr. Theresa M. Bey alleging race and sex discrimination

from denial of tenure. The district court ruled that (1) Dr. Bey failed to establish a *prima facie* case for sex discrimination; and (2) she did establish a *prima facie* case for race discrimination but failed to demonstrate that the Board's legitimate reason for denial, that she had not produced a sufficient quality and quantity of scholarly work to merit tenure—was pretextual. We conclude that no reasonable jury could find by a preponderance of the evidence adduced by Dr. Bey that the Board's profferred legitimate business reason was a pretext. Accordingly, the judgment of the district court is AFFIRMED.

AFFIRMED.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED MARCH 31, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION

NO. 1:97-CV-1630-ODE

THERESA M. BEY,

Plaintiff,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, and STEPHEN PORTCH, in his official capacity as Chancellor of the Board of Regents

Defendants.

ORDER

This civil action, alleging employment discrimination based on sex and race in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e, *et. seq.*, is currently before the court on the March 2, 1999, Report and Recommendation ("R&R") of Magistrate Judge E. Clayton Scofield III ("Magistrate Judge"). In the report, Magistrate Judge Scofield recommends granting summary judgment to Defendants. Plaintiff has filed objections to the report.

Appendix B

When a party files timely objections to a Magistrate Judge's recommended disposition of a dispositive matter, a district court must make a de novo determination as to any portion of the disposition to which the party objects. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(B). As Defendants' motions for summary judgment are dispositive, *see* 28 U.S.C. § 636(b)(1)(B), this court must review the objected-to portions of the March 2, 1999, report on a de novo basis.

Because neither party objects to the majority of the facts as outlined in the Magistrate Judge's R&R, the court will adopt those facts as set forth herein except as otherwise noted, omitting those facts that are irrelevant to the issues before the court. The court also adopts herein all undisputed statements of law contained in the R&R.

Plaintiff Theresa M. Bey ("Plaintiff") received a Ph.D. degree in Educational Administration from the University of Illinois in 1979. Prior to obtaining her Ph.D., Plaintiff taught for several years at the middle and high school levels and she also worked as a school community relations administrator. Plaintiff became an assistant professor at East Texas State University in 1979. [Defs.' Facts ¶ 2]. Plaintiff was awarded tenure as an associate professor at East Texas State in 1986.

The Board of Regents of the University System of Georgia ("Board of Regents") recruited and hired Plaintiff as an associate professor in the Department of Curriculum and Supervision in the College of Education at the University of Georgia ("UGA") in July 1987. (Defs.' Facts ¶ 1; Defs.' Exs. 9, 20). Plaintiff was hired as an associate

professor, rather than an assistant professor, in recognition of her previous background and experience. [Defs.' Facts ¶ 11]. Plaintiff began teaching at UGA during the 1987-88 academic year. As a non-tenured professor at UGA, Plaintiff was employed pursuant to an annual contract. [Defs.' Facts ¶ 3].

In 1991, UGA's Department of Curriculum and Supervision was merged with the Department of School Administration to create the Department of Educational Leadership. [Defs.' Facts ¶ 4]. Dr. Edward Pajak ("Pajak"), a white male, became head of the Department of Educational Leadership in mid-1992. Prior to that time, Plaintiff had three different department heads. [Defs.' Facts ¶ 5].

Plaintiff requested tenure consideration in 1991; however, Dr. Thomas Holmes, department head at that time, instructed Plaintiff to wait because the department was so newly organized. [Defs.' Facts ¶ 7; Pl.'s Resp. ¶ 7]. Plaintiff's application for tenure was considered in May 1992, at which time the tenured faculty voted 7-yes, 7-no, with one abstention; however, only two of the four necessary external evaluations had been received by the time of the vote.[1] [Defs.' Facts ¶ 8]. In June 1992, the faculty voted to purge the record of the May vote and to conduct another vote in the fall after all the letters from the external evaluators had been received. (Defs.' Facts ¶ 8).

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1. External evaluations are evaluations sought from outside the University from individuals who, because of background and experience, are qualified to evaluate the candidate's suitability for tenure.

Appendix B

The tenure process is governed by the UGA "Guidelines for Appointment, Tenure and Promotion" ("Guidelines"). The Guidelines were amended in May 1993, in the middle of Plaintiff's application process; however, both the 1992 and the 1993 Guidelines provide the following basic "criteria" for tenure appointments:

> Those who judge candidates for tenure are responsible for determining whether they are likely to continue to be active and productive scholars over the extended period of time that tenure supposes. Candidates must have a record of exemplary performance in the discharge of their primary responsibilities in teaching, research or other creative activities, and service.[2]

[Pl.'s Resp. ¶ 9; Pl.'s Ex. D at p. 29]. When Plaintiff interviewed with UGA in 1987, she was informed that she would be expected to be a productive scholar. [Defs.' Facts ¶ 11]. The Guidelines provide that an associate professor "may request an annual review conducted according to the defined policy of the promotion/tenure unit." [Pl.'s Ex. D at 17; Defs.' Ex. 6 at 16]. Plaintiff never requested such an annual review. [Defs.' Facts ¶ 10; Defs.' Ex. 20].

When the faculty re-voted on Plaintiff's application for tenure in the fall of 1992, the vote was 4 in favor, 8 opposed. Pajak informed Plaintiff in writing that the department would not be recommending her for tenure. Pajak's letter identified

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2. *See also* [Defs.' Ex. 6, p. 26]. The sentence structure and the order in which the sentences are presented changed slightly in the 1993 version.

concerns expressed by some of the faculty, including (1) lack of evidence of continued active and productive scholarship, (2) insufficiently strong record of exemplary performance in areas assigned, and (3) lack of continuing and long-range programmatic contributions to the department. [Defs.' Facts ¶ 12; Pl.'s Resp. ¶ 12; Defs.' Ex. 10]. Plaintiff appealed the department's negative recommendation. UGA President, Dr. Charles Knapp ("Knapp"), acknowledged inadequacies in Plaintiff's periodic advisement and remanded her appeal to the Vice President of Academic Affairs with instructions that the Department of Educational Leadership afford Plaintiff sufficient research time to allow her an opportunity to attain an acceptable level of research productivity. [Defs.' Facts ¶ 13; Pl.'s Resp. ¶ 13; Defs.' Exs. 11, 12].

On January 12, 1993, Plaintiff met with Pajak to develop a plan to provide time for research and writing. The plan included reduction of Plaintiff's course load, assignment of a graduate assistant, and assistance and input from other faculty on her quality and quantity of publications. The plan also set up a schedule for periodic meetings between Pajak and Plaintiff. The tenure committee indicated that Plaintiff should strive to produce and publish three articles during 1993. [Defs.' Facts ¶ 14; Pl.'s Resp. ¶ 14; Defs.' Ex. 13; Pajak Dep. at 61]. Plaintiff also applied for a Fulbright Scholarship in 1993. [Defs.' Facts ¶ 15].

The 1993-94 academic year was Plaintiff's seventh year as a non-tenured professor. The UGA Guidelines as well as the Board of Regents Policy 803.09(F) specify that the maximum time that may be served at the rank of assistant professor or above without the award of tenure shall

be seven years. [Defs' Facts ¶¶ 16, 18; Defs.' Ex. 6 at 27; Defs.' Ex. 7]. The Board of Regents Policy 803.06(B)(2)(c), requires that notice of intent to renew or not renew a non-tenured faculty member's contract for the following academic year be provided at least nine months prior to the date of termination of the current contract. [Defs.' Facts 17; Ex. 14 at 2]. Plaintiff was notified on or about August 30, 1993, that her contract would not be renewed for the 1994-95 academic year unless she was awarded tenure. [Defs.' Facts ¶ 18; Defs.' Exs. 14, 15].

Plaintiff reapplied for tenure in September 1993. Four external evaluators had been selected, based upon their own achievements and reputation in the field, to review Plaintiff's dossier and publications. Two of these individuals, Ann Lieberman and Kenneth Zeichner, were selected by Plaintiff, and the other two, Carol Camp Yeakey and Noreen Garman, were selected by the tenure committee. [Defs.' Facts ¶ 20; Defs.' Ex. 8]. Garman, Yeakey, and Lieberman all gave Plaintiff exceptional evaluations and recommended she be offered tenure. [Defs.' Ex. 8; Defs.' Facts ¶ 21]. Zeichner gave Plaintiff a generally positive evaluation, noting that Plaintiff was a "very visible person in the teacher education community"; however, he expressed doubts about her scholarship, commenting that it did "not rank as among the most outstanding work in the field." [Defs.' Ex. 8; Pl.'s Resp. ¶ 21].

The outcome of the committee vote on Plaintiff's application on September 29, 1993, was 6 in favor, 8 opposed. [Defs.' Facts ¶ 19; Defs.' Ex. 16]. Of the fourteen faculty members voting, twelve were white males, one was

a white female, and one was a black female. [Defs.' Facts ¶ 19; Defs.' Ex 29]. Pajak's letter informing Plaintiff of the vote identified the same three concerns as had been expressed in the September 1992 letter. [Defs.' Facts ¶ 19; Pl.'s Resp. ¶ 19; Defs.' Exs. 29, 16]. However, these concerns were not shared by the entire committee, as demonstrated by a letter from one voting member, Dr. Beverly Lindsay, to the EEOC stating that several members of the committee found the quality of Plaintiff's work meritorious of tenure. [Defs.' Facts ¶ 22; Defs.' Ex. 28]. The department chair, Pajak, voted in favor of and supported Plaintiff's bid for tenure in 1992 and 1993. [Defs.' Facts ¶ 6].

Plaintiff appealed the department's 1993 decision not to recommend her for tenure. [Defs.' Facts ¶ 23; Defs.' Exs. 17, 18, 21]. On February 21, 1994, President Knapp advised Plaintiff that he was upholding the decisions of both the Department of Educational Leadership and the University Appeals Committee denying her tenure application. [Defs.' Ex. 22] . Plaintiff filed an appeal with the Board of Regents and was notified by letter dated April 13, 1994, that the Board had declined to grant her application for review. [Defs.' Facts ¶ 23; Defs.' Exs. 23, 26].

In May of 1994, UGA was notified by the Council of International Exchange of Scholars that Plaintiff had been awarded a Fulbright Scholarship to lecture and conduct research in Cyprus for the 1994-95 academic year. [Defs.' Facts ¶ 24; Defs.' Ex. 27]. On June 28, 1994, Plaintiff filed a charge of discrimination, alleging the decision to deny her application for tenure was discriminatorily based on her race and sex. [Defs.' Facts ¶ 25; Defs.' Ex. 1].

Appendix B

In the March 2 R&R, the Magistrate Judge recommended summary judgment be granted to Defendant Stephen Portch in his official capacity as Chancellor of the Board of Regents, with regard to all of Plaintiff's Title VII claims as Title VII allows a plaintiff to recover only from her actual employer, and not the individual employee whose actions allegedly violated the Act. The Magistrate Judge also recommended the court decline the exercise of federal jurisdiction over Plaintiff's state law claims, and recommended dismissing them without prejudice to re-file in state court. As Plaintiff does not object to these findings, the court adopts them herein.

In addition, the Magistrate Judge found that Plaintiff failed to establish a prima facie case of sex discrimination, and even if she did, Plaintiff failed to demonstrate the existence of a genuine issue of pretext. While it appears that Plaintiff may have misread the R&R, since she did not object to this finding, the court adopts it herein.[3]

The Magistrate Judge also concluded that while Plaintiff met her burden of establishing a prima facie case of race

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3. Plaintiff stated that "[t]he Magistrate Judge correctly determined that the Plaintiff has met each element of her prima facie case with respect to *each* of her Title VII claims." [Plaintiff's objections to R&R at 3 (emphasis added)]. Regardless, even if Plaintiff had specifically objected to the Magistrate Judge's finding on this issue, and even if the Magistrate Judge (or this court) found that Plaintiff established a prima facie case of sex discrimination, the court concludes that she did not demonstrate that Defendants' legitimate, non-discriminatory reason for her tenure denial was pretextual. (See discussion, infra.)

discrimination, she failed to present facts raising a genuine issue of material fact that Defendants' legitimate non-discriminatory reason for denying Plaintiff tenure was pretextual.[4] It is on these grounds that Plaintiff objects.

Plaintiff contends that the Magistrate Judge erred in concluding that she failed to show that Defendants' proffered reason for their failure to grant Plaintiff tenure is mere pretext. Plaintiff contends that the Magistrate Judge applied the wrong standard for analysis for Plaintiff's burden. Because this is a summary judgment motion, Plaintiff need only raise a genuine issue of material fact that the reason was a pretext; she does not need to actually prove it. *Maddow v. Proctor & Gamble Company, Inc.*, 107 F.3d 846, 851 (11th Cir. 1997). As discussed below, the court finds that the Magistrate Judge did not apply the wrong standard for Plaintiff's claim of pretext.

The denial of tenure involves a somewhat different analysis in the employment discrimination context. Courts

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4. While the court agrees with the Magistrate Judge's finding that Plaintiff established a prima facie case of race discrimination, it notes that the standard established in other circuits in denial of tenure Title VII cases would have been more appropriate. This standard was set forth in *Zahorik v. Cornell University*, 729 F.2d 85 (2nd Cir. 1984) . The Second Circuit established that a prima facie case of Title VII discrimination in the failure to grant tenure is demonstrated by showing that: (1) plaintiff was a member of a protected group; (2) she was qualified for tenure; and (3) she was not granted tenure in circumstances permitting an inference of discrimination. *Id.* at 92. *See also Kumar v. University of Massachusetts*, 774 F.2d. 1 (1st Cir. 1985); *Tanik v. Southern Methodist University*, 116 F.3d 775 (5th Cir 1997).

are reluctant to review the merits of a tenure decision. *Zahorik v. Cornell University*, 729 F.2d 85, 93 (2nd Cir. 1984). For a Plaintiff to succeed in carrying his burden of persuasion:

> the evidence must show more than a denial of tenure in the context of disagreement about the scholarly merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department or university. Absent evidence sufficient to support a finding that such disagreements or doubts are influenced by forbidden considerations such as sex or race, universities are free to establish departmental priorities, to set their own required levels of academic potential and achievement and to act upon the good faith judgments of their departmental faculties or reviewing authorities.

Id. at 94. While the Eleventh Circuit has yet to address the issue of a Title VII claim in the context of tenure denial, other circuits have "recognized that tenure decisions in colleges and universities involve considerations that set them apart from other kinds of employment decisions. Those factors are: (1) tenure contracts require unusual commitments as to time and collegial relationships, (2) academic tenure decisions are often noncompetitive, (3) tenure decisions are usually highly decentralized, (4) the number of factors considered in tenure decisions is quite extensive, and (5) tenure decisions are a source of unusually great disagreement. *Tanik v. Southern Methodist University,* 116 F.3d 775, 776 (5th Cir. 1997) (*citing Zahorik,* 729 F.2d at 93; *Kumar v. University of Massachusetts,* 774 F.2d. 1, 11 (1985).

With this in mind, the court now turns to Plaintiff's showing of pretext. As the Magistrate Judge noted, Defendants' proffered legitimate, non-discriminatory reason for denying Plaintiff tenure is that Plaintiff had not produced a sufficient quality or quantity of scholarly work.[5] Defendants also cite Plaintiff's May 1992 evaluation by acting department head Holmes, stating that "Dr. Bey ranked below average among the departmental faculty in indicators of research productivity" and "in the bottom quartile . . . in the indicators of instructional excellence." [R&R at 16, citing Defs.' Ex. 5]. Defendants compared Plaintiff's three positive evaluations and one negative external evaluation, to Roberts' six external evaluations, although the Magistrate Judge indicated that the total number of external evaluations was not probative, as Defendants only requested that Plaintiff produce four, compared to the request of six evaluations for Plaintiff's comparator, Dr. RebaJo Roberts ("Roberts").[6]

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5. Plaintiff did not object to the Magistrate Judge's description of Defendants' legitimate, non-discriminatory reason, therefore it is adopted herein.

6. In order to establish her prima facie case, Plaintiff proffered Roberts as a comparator. As the Magistrate Judge noted:

> Roberts and Plaintiff were employed in the same department an UGA. Roberts, a white female, became an assistant professor at UGA in the 1989-90 academic year, and had previously served as an assistant professor at the University of Colorado from 1986-1989. Roberts was promoted to associate professor and awarded tenure at UGA in 1992. Comparatively, Plaintiff became an

(Cont'd)

Finally, Defendant acknowledged that Pajak voted for and was supportive of Plaintiff, but he also indicated that it was a "close call" whether Plaintiff had made significant progress in her scholarly activity to merit tenure. [*Id.*, citing Pajak Dep. at 74].

Plaintiff, relying on *Tanik*, contends that she set forth evidence of pretext by showing that she is found to be qualified for tenure by "some significant portion of the departmental faculty, referents, or other scholars in the particular field," by "departures from procedural regularity," and by "conventional evidence of bias on the part of the individuals involved."[7] *See Tanik*, 116 F.3d at 776.

Plaintiff first contends that she proffered "abundant evidence" which refutes Defendants' claim that her scholarly work was inadequate. To make such proof, Plaintiff cites: (1) Pajak's testimony that he thought she should be awarded

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(Cont'd)

associate professor at UGA in the 1987-88 academic year after previously serving as an assistant (1979-1984) and then associate (1984-1987) professor at East Texas State University for eight years. In addition, Plaintiff points to Pajak's deposition testimony stating that Plaintiff and Roberts were similarly situated. [R&R at 14-15].

7. While Plaintiff uses these three factors to illustrate pretext, the *Tanik* court used them to demonstrate how a plaintiff could prove a *prima facie* case. *Tanik*, 116 F.3d at 776. Nevertheless, the court will utilize Plaintiff's description in determining whether she established a genuine issue of material fact that Defendants' proffered reason was pretextual.

tenure and his belief that her qualifications were comparable to Roberts; (2) a comparison of Plaintiff to Roberts which illustrates that they both received "glowing" letters of support from Dr. Garman of the University of Pittsburgh;[8] (3) Dr. Zeichner's recommendation, which according to Plaintiff, notes her strong service and teaching record, despite his opinion that "her scholarship does not rank as among the most outstanding in the field"; (4) Lindsay's statement to the EEOC, which points out that Plaintiff's qualifications are comparable to those awarded tenure, that her hiring at the associate professor level necessarily implies a level of achievement similar to tenure standards, and that criticisms of her publications were equally applicable to white males who were tenured; and (6) the close vote for her tenure application. Plaintiff contends that this evidence was sufficient to show that a significant portion of the faculty considered her qualified for tenure.

As to alleged procedural irregularities, Plaintiff cites Knapp's determination that Plaintiff's performance reviews did not provide meaningful guidance, and therefore requested that Plaintiff be allowed the opportunity to increase her level of research productivity; that under the guidelines, Plaintiff was not required to request a formal review; and that Plaintiff was deprived of a third-year evaluation.

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8. The court agrees with the Magistrate Judge that while Plaintiff's comparison to Roberts was sufficient to establish her prima facie case of race discrimination, such comparison was insufficient to demonstrate pretext. *See Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596 (11th Cir. 1987) ("[A] plaintiff may not . . . merely rest on the laurels of her prima facie case in the face of powerful justification evidence offered by the defendant").

Finally, as part of her pretext argument, Plaintiff proffers evidence of "conventional bias." She contends that minorities were excluded from the collegial mentoring process, and supports this contention by Dr. Mary Atwater's ("Atwater") statement that the College of Education does little to support black faculty members.[9] She also claims that discriminatory animus is illustrated by the additional obstacles minorities must overcome, such as second votes or appeals of tenure denial, citing specific examples of African Americans and/or women who had additional difficulty in obtaining tenure.

The court finds that Plaintiff's illustrations of pretext set forth above are essentially the same arguments which the Magistrate Judge considered in evaluating whether Plaintiff demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (citation and internal quotation marks omitted).

Having duly considered the matter, the court agrees with the Magistrate Judge's conclusion that Plaintiff failed to establish that Defendants' legitimate, non-discriminatory reason for denying Plaintiff tenure was pretext for race

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9. Atwater is a professor in the School of Teacher Education. The Magistrate Judge pointed out that Atwater's comments do not provide substantial evidence concerning Plaintiff's tenure decision as the School of Teacher Education is a separate division of the Department of Educational Leadership. [R&R at 20].

discrimination, and adopts his reasoning herein.[10] The court also finds that contrary to Plaintiff's assertions, the Magistrate Judge did not require Plaintiff to prove pretext, but merely evaluated her proffered evidence to determine if it was sufficient to demonstrate contradictions and inconsistencies in Defendants' proffered reasons. Plaintiff failed to address any of the Magistrate Judge's findings concerning all the aforementioned reasons that Plaintiff gave for showing pretext, and instead solely argued that the Magistrate Judge subjected Plaintiff to an inappropriately high burden.

The vote on Plaintiff's tenure admittedly was a close call. Rather than showing evidence of pretext, however, this illustrates that while several members found that Plaintiff was qualified for tenure, the majority decided she was undeserving of tenure. As the Magistrate Judge noted, "the question is not whether it was reasonable to disagree with the employment decision, but whether the decision was based on discriminatory motives." [R&R at 23, citing *Combs,* 106 F.3d at 1543]. Plaintiff has failed to meet the burden of demonstrating that her tenure denial was motivated by discrimination based on Plaintiff's race (or sex). In particular, given the subjective nature of a tenure decision, and the fact that such decisions are a "source of unusually great disagreement," this court finds "that a finder of fact could [not] have concluded, based on these facts, that [Plaintiff's denial of tenure] was motivated by discriminatory animus." *Williams v. Vitro Services Corp.*, 144 F.3d 1438, 1444 (11th Cir. 1998).

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10. In addition, the court agrees with the Magistrate Judge's conclusion that Plaintiff's proffered statistical evidence was inadequate to establish a discriminatory pattern or practice.

Appendix B

Accordingly, the court ADOPTS the Magistrate Judge's R&R. Defendants' motion for summary judgment [#14] is GRANTED as to Plaintiff's race and sex discrimination claims under Title VII. Plaintiff's state law claims are DISMISSED without prejudice to refile in state court.

SO ORDERED, this 31 day of March, 1999.

s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE

NO. 1:97-cv-1630-ODE

Theresa M. Bey,

Plaintiff,

vs.

The Board of Regents of the University System of Georgia, Stepehn Portch,

Defendants.

JUDGMENT

This action having come before the court, Honorable Orinda D. Evans, United States District Judge, for consideration of the Magistrate Judge's report and recommendation as to defendants' motion for summary judgment, and the court having adopted said recommendation and granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendants recover their costs of this action, and the action be, and the same hereby, is **dismissed**.

Appendix B

Dated at Atlanta, Georgia, this 31st day of March, 1999.

LUTHER D. THOMAS
CLERK OF COURT

By: s/ Frances M. McNulty
Frances M. McNulty, Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
April 1, 1999
Luther D. Thomas
Clerk of Court

By: s/ Frances M. McNulty
Deputy Clerk

APPENDIX C — MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION IN AN EMPLOYMENT DISCRIMINATION ACTION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED MARCH 2, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
NO. 1:97-CV-1630-ODE

THERESA M. BEY,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, and, STEPHEN PORTCH, in his official capacity as Chancellor of the Board of Regents,

Defendants.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION IN AN EMPLOYMENT DISCRIMINATION ACTION

Plaintiff commenced this civil action on June 5, 1997, charging defendants with race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* Plaintiff also presents

a breach of contract claim under Georgia state law. This matter is presently before the Court on defendants' motion for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure as to all of plaintiff's claims [Doc. No. 14].

I.

Procedural Matters

The Court notes that both the memorandum of law in support of the motion and the reply brief filed by defendants are replete with footnotes that are single-spaced and of a font size much smaller than that allowed by the Local Rules of this Court. *See* LR 5.1(B) and 7.1(D), NDGa. Microfootnotes are not a loophole for circumventing the page and type limitations of the local rules. In the future, such non-conforming briefs will be unceremoniously stricken.

In addition, defendants filed several exhibits with its reply brief without seeking leave of Court to do so. Rule 56 of the Federal Rules of Civil Procedure as well as the local rules of this Court require that supporting materials, including affidavits, be filed with the motion for summary judgment. *See* Fed. R. Civ. P. 56; LR 56.1 and 7.1C(l) ("If allegations of fact are relied upon, supporting affidavits must be attached to the memorandum of law."). While the local rules of this Court allow a movant to file a reply within ten days of service of the non-movant's response, the rules do not permit the filing of additional affidavits in support of a motion for summary judgment without leave of court. *See* LR 56.1A ("In accordance with LR 7.1C the parties shall not be

permitted to file supplemental briefs and materials, with the exception of a reply by the movant, except upon order of the court."). Because defendants did not obtain leave, these exhibits will not be considered in connection with this motion.

II.

Factual Background

When evaluating the merits of a motion for summary judgment, the Court must view the evidence and factual inferences in a light most favorable to the non-moving party. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 920 (11th Cir. 1993); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987). Applying this rule, and for summary judgment purposes only, the following facts derived from the parties' statements of facts and from the record as a whole are deemed to be true[1]:

Plaintiff, Theresa M. Bey, received a Ph.D. degree in Educational Administration from the University of Illinois in 1979. Prior to obtaining her Ph.D., plaintiff taught for several years at the middle and high school levels and she

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1. The facts presented are, in the main, undisputed by the parties. References solely to defendants' statement of facts ("Defs.' Facts") indicate that plaintiff either admitted or did not dispute the fact. References to plaintiff's response to defendants' facts ("Pl.'s Resp.") indicates that the Court has accepted, for purposes of the motion, plaintiff's version of the corresponding fact or has omitted certain portions of defendants' version that have been disputed by plaintiff.

also worked as a school community relations administrator. Plaintiff became an assistant professor at East Texas State University in 1979. (Defs.' Facts ¶ 2) . Plaintiff was awarded tenure as an associate professor at East Texas State in 1986.

The Board of Regents of the University System of Georgia ("Board of Regents") recruited and hired plaintiff as an associate professor in the Department of Curriculum and Supervision in the College of Education at the University of Georgia ("UGA") in July 1987. (Defs.' Facts ¶ 1; Defs.' Exs. 9, 20). Plaintiff was hired as an associate professor, rather than an assistant professor, in recognition of her previous background and experience. (Defs.' Facts ¶ 11). Plaintiff began teaching at UGA during the 1987-88 academic year. As a non-tenured professor at UGA, plaintiff was employed pursuant to an annual contract. (Defs.' Facts ¶ 3).

In 1991, UGA's Department of Curriculum and Supervision was merged with the Department of School Administration to create the Department of Educational Leadership. (Defs.' Facts ¶ 4) . Dr. Edward Pajak, a white male, became head of the Department of Educational Leadership in mid-1992. Prior to that time, plaintiff had three different department heads. (Defs.' Facts ¶ 5).

Plaintiff requested tenure consideration in 1991; however, Dr. Thomas Holmes, department head at that time, instructed plaintiff to wait because the department was so newly organized. (Defs.' Facts ¶ 7; Pl.'s Resp. ¶ 7). Plaintiff's

application for tenure was considered in May 1992, at which time the tenured faculty voted 7 yes, 7 no, with one abstention; however, only two of the four necessary external evaluations had been received by the time of the vote.[2] (Defs.' Facts ¶ 8). In June 1992, the faculty voted to purge the record of the May vote and to conduct another vote in the fall after all the letters from the external evaluators had been received. (Defs.' Facts ¶ 8).

The tenure process is governed by the UGA "Guidelines for Appointment, Tenure and Promotion" ("Guidelines"). The Guidelines were amended in May 1993, in the middle of plaintiff's application process; however, both the 1992 and the 1993 Guidelines provide the following basic "criteria" for tenure appointments:

> Those who judge candidates for tenure are responsible for determining whether they are likely to continue to be active and productive scholars over the extended period of time that tenure supposes. Candidates must have a record of exemplary performance in the discharge of their primary responsibilities in teaching, research or other creative activities, and service.[3]

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2. External evaluations are evaluations sought from outside the university from individuals who, because of background and experience, are qualified to evaluate the candidate's suitability for tenure.

3. *See also* (Defs.' Ex. 6, p. 26). The sentence structure and the order in which the sentences are presented changed slightly in the 1993 version.

(Pl.'s Resp. ¶ 9; Pl.'s Ex. D at p. 29).[4] When plaintiff interviewed with UGA in 1987, she was informed that she would be expected to be a productive scholar. (Defs.' Facts ¶ 11). The Guidelines provide that an associate professor "may request an annual review conducted according to the defined policy of the promotion/tenure unit." (Pl.'s Ex. D at 17; Defs.' Ex. 6 at 16). Plaintiff never requested such an annual review. ((Defs.' Facts ¶ 10; Defs.' Ex. 20).

When the faculty re-voted on plaintiff's application for tenure in the fall of 1992, the vote was 4 in favor, 8 opposed. Pajak informed plaintiff in writing that the department would not be recommending her for tenure. Pajak's letter identified concerns expressed by some of the faculty, including (1) lack of evidence of continued active and productive scholarship, (2) insufficiently strong record of exemplary performance in areas assigned, and (3) continuing and long-range programmatic contributions to the department. (Defs.' Facts ¶ 12; Pl.'s Resp. ¶ 12; Defs.' Ex. 10). Plaintiff appealed the department's negative recommendation. UGA President, Dr. Charles Knapp, acknowledged inadequacies in plaintiff's periodic advisement and remanded her appeal to the Vice President of Academic Affairs with instructions that the Department of Educational Leadership afford plaintiff sufficient research time to allow her an opportunity to attain an acceptable level of research productivity. (Defs.' Facts ¶ 13; Pl.'s Resp. ¶ 13; Defs.' Exs. 11, 12).

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4. Plaintiff's exhibits were filed with her factual response to defendants' facts and are located at [Doc. No. 18]. Plaintiff's brief in opposition to the motion for summary judgment was filed separately and is located at [Doc. No. 20].

Appendix C

On January 12, 1993, plaintiff met with Pajak to develop a plan to provide time for research and writing. The plan included reduction of plaintiff's course load, assignment of a graduate assistant, and assistance and input from other faculty on her quality and quantity of publications. The plan also set up a schedule for periodic meetings between Pajak and plaintiff. The tenure committee indicated that plaintiff should strive to produce and publish three articles during 1993. (Defs.' Facts ¶ 14; Pl.'s Resp. ¶ 14; Defs.' Ex. 13; Pajak Dep. at 61). Plaintiff also applied for a Fulbright scholarship in 1993. (Defs.' Facts ¶ 15).

The 1993-94 academic year was plaintiff's seventh year as a non-tenured professor. The UGA Guidelines as well as the Board of Regents Policy 803.09(F) specify that the maximum time that may be served at the rank of assistant professor or above without the award of tenure shall be seven years. (Defs.' Facts ¶¶ 16, 18; Defs.' Ex. 6 at 27; Defs.' Ex. 7). The Board of Regents Policy 803.06(B) (2) (c), requires that notice of intent to renew or not renew a non-tenured faculty member's contract for the following academic year be provided at least nine months prior to the date of termination of the current contract. (Defs.' Facts ¶ 7; Ex. 14 at 2). Plaintiff was notified on or about August 30, 1993, that her contract would not be renewed for the 1994-95 academic year unless she was awarded tenure. (Defs.' Facts ¶ 18; Defs.' Exs. 14, 15).

Plaintiff reapplied for tenure in September 1993. Four external evaluators had been selected, based upon their own achievements and reputation in the field, to review plaintiff's dossier and publications. Two of these individuals, Ann

Lieberman and Kenneth Zeichner, were selected by plaintiff, and the other two, Carol Camp Yeakey and Noreen Garman, were selected by the tenure committee. (Defs.' Facts ¶ 20; Defs.' Ex. 8). Garman, Yeakey, and Lieberman all gave plaintiff exceptional evaluations and recommended she be offered tenure. (Defs.' Ex. 8; Defs.' Facts ¶ 21). Zeichner gave plaintiff a generally positive evaluation, noting that plaintiff was a "very visible person in the teacher education community"; however, he expressed doubts about her scholarship, commenting that it did "not rank as among the most outstanding work in the field." (Defs.' Ex. 8; Pl.'s Resp. ¶ 21).

The outcome of the committee vote on plaintiff's application on September 29, 1993, was 6 in favor, 8 opposed. (Defs.' Facts ¶ 19; Defs.' Ex. 16) . Of the fourteen faculty members voting, twelve were white males, one was a white female, and one was a black female. (Defs.' Facts ¶ 19; Defs.' Ex 29). Pajak's letter informing plaintiff of the vote identified the same three concerns as had been expressed in the September 1992 letter. (Defs.' Facts ¶ 19; Pl.'s Resp. ¶ 19; Defs.' Exs. 29, 16). However, these concerns were not shared by the entire committee, as demonstrated by a letter from one voting member, Dr. Beverly Lindsay, to the EEOC stating that several members of the committee found the quality of plaintiff's work meritorious of tenure. (Defs.' Facts ¶ 22; Defs.' Ex. 28). The department chair, Pajak, voted in favor of and supported plaintiff's bid for tenure in 1992 and 1993. (Defs.' Facts ¶ 6) .

Plaintiff appealed the department's 1993 decision not to recommend her for tenure. (Defs.' Facts ¶ 23; Defs.' Exs.

17, 18, 21). On February 21, 1994, President Knapp advised plaintiff that he was upholding the decisions of both the Department of Educational Leadership and the University Appeals Committee denying her tenure application. (Defs.' Ex. 22). Plaintiff filed an appeal with the Board of Regents and was notified by letter dated April 13, 1994, that the Board had declined to grant her application for review. (Defs.' Facts ¶ 23; Defs.' Exs. 23, 26).

In May of 1994, UGA was notified by the Council of International Exchange of Scholars that plaintiff had been awarded a Fulbright Scholarship to lecture and conduct research in Cyprus for the 1994-95 academic year. (Defs.' Facts ¶ 24; Defs.' Ex. 27). On June 28, 1994, plaintiff filed a charge of discrimination, alleging the decision to deny her application for tenure was discriminatorily based on her race and sex. (Defs.' Facts ¶ 25; Defs.' Ex. 1).

III.

The Standard of Review on Summary Judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998). A factual dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The substantive law applicable to the case determines which facts are material. *Anderson*, 477 U.S. at 248.

The moving party bears the initial burden of showing the court "the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Four Parcels,* 941 F.2d at 1437 (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)) . If the moving party fails to discharge this initial burden, then the motion must be denied. *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1116 (11th Cir. 1993) (citing *Clark v. Coats & Clark, Inc.,* 929 F.2d 604, 608 (11th Cir. 1991)).

When the non-moving party has the burden of proof at trial, the moving party may discharge its initial burden "showing . . . the district court . . . that there is an absence of evidence to support the non-moving party's case." *Celotex,* 477 U.S. at 325 (internal quotes omitted); *accord Four Parcels,* 941 F.2d at 1437-38. Once this burden is met, the non-moving party must then "go beyond the pleadings and . . . designate specific facts showing that there is a genuine issue for trial." *Celotex,* 477 U.S. at 324 (citing Fed. R. Civ. P. 56(e)).

IV.

Discussion

A. *Title VII Claims Against Defendant Portch*

Plaintiff filed suit against her employer, the Board of Regents, as well as Chancellor Portch in his official capacity. An official-capacity suit against a state officer is not a suit

against the official but rather is a suit against the official's office. *Hafer v. Melo,* 502 U.S. 21, 26 (1991) (quotation marks omitted) (quoting *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71 (1989)). "State officers sued for damages in their official capacity are not 'persons' for the purposes of the suit because they assume the identity of the government that employs them." *Id.* at 27.

Title VII allows a plaintiff to recover only from his actual employer, and not the individual employees whose actions allegedly violated the Act. *See Cross v. State of Alabama,* 49 F.3d 1490, 1504 (11th Cir. 1995); *Busby v. City of Orlando,* 931 F.2d 764, 772 (11th Cir. 1991) ("We think the proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly."). As plaintiff has named the employer directly by naming the Board of Regents, summary judgment should be GRANTED to defendant Portch as to all of plaintiff's Title VII claims.

B. ***Race and Sex Discrimination Under Title VII***

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In an employment discrimination disparate treatment action, the plaintiff has the burden of persuading the factfinder that the defendant intentionally discriminated against her. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252-53

(1981). The allocation of burdens were established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-804 (1973), as follows: (1) the plaintiff has the burden of establishing a prima facie case of discrimination; (2) once the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the action taken against the employee; and (3) if defendant carries this burden, plaintiff must have an opportunity to show that the legitimate reason offered by defendant was a pretext for discrimination.

A plaintiff may establish a prima facie case of discrimination by presenting any of three types of evidence: (1) direct evidence of discriminatory intent; (2) statistical evidence of disparate treatment; or (3) circumstantial evidence meeting a test similar to that set out in *McDonnell Douglas. Holifield v. Reno,* 115 F.3d 1555, 1561-62 (11th Cir. 1997); *Carter v. City of Miami,* 870 F.2d 578, 581 (11th Cir. 1989). Plaintiff has presented statistical and circumstantial evidence in this case.[5]

The basic framework for establishing a prima facie case relying on circumstantial evidence is set out in *McDonnell Douglas*; however, the framework is a flexible guide and is "not necessarily applicable in every respect in differing

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5. Plaintiff claims she has presented direct evidence of discrimination. *See* (Pl.'s Br. at 8). Contrary to plaintiff's assertion, the Court finds no direct evidence in plaintiff's brief, exhibits, or the record in general. *See Carter v. Three Springs Residential Treatment,* 132 F.3d 635, 641 (11th Cir. 1998) (defining direct evidence as "evidence, which if believed, proves existence of fact in issue without inference or presumption").

factual situations." *McDonnell Douglas,* 411 U.S. at 802 n.13; *Burdine,* 450 U.S. at 253-54 n.6; *accord Furnco Construction Corp. v. Waters,* 438 U.S. 567, 575-77 (1978). Generally, a plaintiff need only show that "she applied for an available position for which she was qualified but was rejected under circumstances that give rise to an inference of unlawful discrimination." *Burdine,* 450 U.S. at 253; *see also Holifield,* 115 F.3d at 1562 ("Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination").

Denial of tenure is similar to the denial of a promotion, except that tenure decisions usually do not involve choosing one individual over another for a particular vacant position. In addition, plaintiff's department at UGA was very small and there may be years when only one person, or none at all, applies for tenure. Following the guidance provided by Supreme Court precedent, and modifying the standard prima facie test to accommodate the unique aspects of tenure, plaintiff may establish her prima facie case by showing (1) she belonged to a protected group; (2) she applied for and was qualified for the position; (3) she was rejected despite her qualifications; and (4) similarly situated individuals outside of plaintiff's protected group were treated more favorably (i.e., granted tenure) during a reasonably contemporaneous time period. *Compare Walker v. Mortham,* 158 F.3d 1177, 1192-93 (11th Cir. 1998) (discussing failure to promote prima facie case); *with Holifield,* 115 F.3d at 1562 (discussing similarly situated, differential treatment prima facie case) (citing *McDonnell Douglas,* 411 U.S. at

802); *see also Burdine,* 450 U.S. at 253-54; *Furnco,* 438 U.S. at 575-77; *Jamerson v. Board of Trustees,* 662 F.2d 320, 322 (5th Cir. Unit B 1981).

Defendants concede that plaintiff belongs to a protected class, that she was qualified, and that she was subjected to an adverse employment action when she was denied tenure. *See* (Defs.' Br. at 7). Defendants argue, however, that plaintiff cannot show that she was treated less favorably than others outside of her protected class. Although the analysis is largely the same for both of plaintiff's claims, certain of plaintiff's evidence pertains specifically to race, or sex, but not both. Therefore, the Court will address each of plaintiff's discrimination claims separately.

1. Race Discrimination Claim

Plaintiff offers Dr. RebaJo Roberts as a comparator.[6] Roberts and plaintiff were employed in the same department at UGA.[7] Roberts, a white female, became an assistant professor at UGA in the 1989-90 academic year, and had previously served as an assistant professor at the University of Colorado from 1986-1989. Roberts was promoted to associate professor and awarded tenure at UGA in 1992.

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6. Dr. Roberts apparently married sometime after being awarded tenure and has at times been referred to by the parties as Roberts-Blase; however, to remain consistent with the documentary evidence in the record, the Court will refer to her as Roberts.

7. Both individuals were hired into the Department of Curriculum and Supervision, which later became the Department of Educational Leadership.

Comparatively, plaintiff became an associate professor at UGA in the 1987-88 academic year after previously serving as an assistant (1979-1984) and then associate (1984-1987) professor at East Texas State University for eight years. In addition, plaintiff points to Pajak's deposition testimony stating that plaintiff and Roberts were similarly qualified. (Pajak Dep. at 93).

Defendants agree that plaintiff may compare her tenure application process to that of Roberts, even though Roberts applied in 1991 and was granted tenure in 1992. (Defs.' Reply at 2-3). Defendants dispute, however, that the two individuals were similarly qualified for tenure. Defendants' argument regarding the best qualified candidate, however, is more appropriately addressed at the second stage of the Title VII analysis. At the prima facie stage, plaintiff need only show that she herself was qualified for the coveted position, not that the successful applicant was equally or less qualified.[8] *Walker,* 158 F.3d at 1192-93. Therefore, the Court finds, for purposes of this motion, that plaintiff has established a prima facie case.[9]

Once the prima facie case is established, defendants must articulate a legitimate nondiscriminatory reason for their actions. *Burdine,* 450 U.S. at 253; *McDonnell Douglas,* 411 U.S. at 802-04. Relative qualifications may become relevant at this stage of the inquiry. *Walker,* 158 F.3d at 1193.

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8. As stated above, defendants explicitly conceded that plaintiff was qualified for the position.

9. Plaintiff also presented statistical evidence allegedly demonstrating a lack of African-American representation throughout UGA. This evidence will be discussed below.

Appendix C

Defendants assert that a majority of the tenure review committee voted to deny plaintiff's application because she had not produced a sufficient quality or quantity of scholarly work. (Defs.' Br. at 8; Defs.' Ex. 20). Defendants also point to plaintiff's May 1992 evaluation by acting department head Holmes, stating that "Dr. Bey ranked below average among the departmental faculty in indicators of research productivity" and "in the bottom quartile . . . in the indicators of instructional excellence." (Defs.' Ex. 5). Specifically comparing plaintiff and Roberts, defendants assert that plaintiff received three positive and one negative external evaluation, while all six of Roberts' external evaluations were positive.[10] While defendants acknowledge that Pajak voted for and supported plaintiff's application, they also point out that Pajak believed it was a "close call" whether plaintiff had made significant progress in her scholarly activity to merit an award of tenure. (Pajak Dep. at 74).

Defendants have satisfied their burden of articulating legitimate nondiscriminatory reasons for the denial of plaintiff's tenure application. Therefore, the inference of discrimination arising from the prima facie showing drops from the case and plaintiff is required to " 'present evidence that [the employer's] legitimate reasons were not what actually motivated its conduct.' " *Combs v. Plantation Patterns,* 106 F.3d 1519, 1531 (11th Cir. 1997) (quoting *Cooper-Houston v. Southern Railway Co.*, 37 F.3d 603, 605 (11th Cir. 1994)).

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10. The Court notes that the total number of external evaluations is not probative, as defendants only requested four external evaluations for plaintiff, compared to the request of six for Roberts.

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Plaintiff disputes that her level of scholarship was inadequate and claims that she has presented significant evidence to challenge the credibility of defendants' proffered reasons. Specifically, plaintiff asserts that defendants have mischaracterized the letter from external evaluator Zeichner as "negative." Although Zeichner observed that plaintiff's scholarship was not ranked among the most outstanding work in the field, he also commented that her service record was very strong and that if her teaching record was equally strong, he could see a possible case for granting her tenure even though her scholarship was not outstanding. In addition, plaintiff asserts that being "among the most outstanding in the field" is not a prerequisite for tenure at UGA. Plaintiff also shows that another black female, Mary Frazier, received an unfavorable recommendation from the School of Education for the same reason, inadequate scholarship. In that case, President Knapp disagreed with the vote and reversed the decision. (Knapp Dep. at 18-19).

Plaintiff further argues that, even assuming her quantity and quality of scholarly activity was less than outstanding, this failure resulted from procedural irregularities and lack of meaningful guidance from the department. To support this contention, plaintiff refers to Dr. Knapp's decision to remand the 1992 department vote in order to allow adequate time to produce additional scholarship. Plaintiff contends that this lack of guidance is consistent with her statistical evidence derived from defendants' annual EEO-6 reports demonstrating that African Americans are under-represented among tenured faculty at UGA. *See* (Pl.'s Ex. E).

Plaintiff also points to Dr. Lindsay's letter to the EEOC in which she stated that plaintiff's dossier was comparable

to other faculty members who have been awarded tenure and that certain criticisms of her publications were equally applicable to white, male faculty members who were tenured. *See* (Defs.' Ex. 28). Dr. Lindsay co-authored a lengthy memo in February of 1996, reporting racial concerns that had been discussed at a luncheon sponsored by the Dean of the College of Education, Dr. Yeany. (Pl.'s Ex. S). Plaintiff additionally refers to the affidavit provided to the Georgia Commission on Equal Opportunity by Mary Atwater stating that there is little support for the black faculty within the College of Education and that "black faculty members are perceived as 'affirmative action hires.' " (Pl.'s Ex. Q).

As an initial matter, the Court must address plaintiff's statistical evidence allegedly demonstrating that blacks have been the victims of a pattern or practice of discrimination at UGA. Plaintiff's chart at exhibit E shows that in 1987, 1992, and 1993, less than 2% of the tenured faculty were black. However, the statistics also show that blacks accounted for a similarly small percentage of the overall faculty — 1.5% in 1987, 3.69% in 1992, and 3.55% in 1993.[11] Therefore, the low number of blacks in tenured positions is not on its face significant when compared to the total number of black faculty. These low numbers do not by themselves demonstrate discriminatory practices because they say nothing about the qualified labor pool. *See Hazelwood School Dist. v. United States,* 433 U.S. 299, 308 (1977); *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 996-97 (1988). Plaintiff provided no evidence regarding the qualifications of the non-tenured black faculty, nor did she present evidence

11. These percentages are based on the total number of faculty members, regardless of tenure track status. *See* (Pl.'s Ex. E).

to show that qualified black applicants were discriminatorily turned away at the hiring stage, thus resulting in the low numbers from which to draw tenured faculty. Without this information, the statistics have little, if any, significance. *See Watson,* 487 U.S. at 997 (citing *Hazelwood,* 433 U.S. at 308); *accord Hawkins v. CECO Corp.,* 883 F.2d 977, 985 (1989).

The Court is also unpersuaded by plaintiff's allegation that her lack of scholarly productivity was a result of inadequate guidance. Plaintiff acknowledges that UGA had published guidelines for promotion and tenure, and that she had access to those publications. *See* (Pl.'s Dep. at 49-50). She admits that she was informed when she was hired by UGA that she would be expected to be a productive scholar. *See* (Defs.' Facts ¶ 11; Pl.'s Resp. ¶ 11). Plaintiff also possessed a general understanding that research and scholarly publications were considered when determining whether or not to grant tenure. *See* (Pl.'s Dep. at 33-36). In addition, defendants provided assistance to plaintiff in January of 1993 when Knapp remanded the department's negative recommendation. Plaintiff's teaching load was reduced and she was assigned a graduate assistant so that she would have more time to devote to her research and writing. When the faculty re-voted nine months later, a majority still found that plaintiff's level of scholarship was not deserving of tenure.

Dr. Atwater's comments about the lack of support for black faculty within the College of Education shed little light on the tenure decision made about plaintiff by the Department of Educational Leadership. Although both Atwater and plaintiff worked in divisions within the College of Education,

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Atwater was a professor in the School of Teacher Education, which is a separate division from the Department of Educational Leadership. The faculty who voted on plaintiff's application were all tenured members of the Department of Educational Leadership, and no decision was ever made at the College of Education level. Thus, the focus of plaintiff's challenge remains her own department, not the practices of the over-arching College of Education.

This leaves the statements of Dr. Lindsay to support plaintiff's allegations of discriminatory motive. Unlike Atwater, Lindsay was a faculty member of the Department of Educational Leadership. At one time, Lindsay also served as an associate dean within the College of Education. *See* (Pl.'s Dep. at 44). Lindsay was the only other black faculty member (male or female) within the Department of Educational Leadership while plaintiff was employed at UGA. *See* (Pl.'s Ex. M). During the majority of the years that plaintiff was at UGA, Lindsay was away working on special projects at other institutions; however, Lindsay did participate in the tenure vote on plaintiff's application. *See* (Pl.'s Dep. at 43-44; Defs.' Ex. 28). Lindsay stated in her response to the EEOC that plaintiff's dossier was "comparable to other University faculty who have been granted tenure"; that her publications "clearly attest to her scholarly expertise"; and that "her work merits the granting of tenure." (Defs.' Ex. 28 ¶ 3).

Lindsay also acknowledged that other faculty complained that plaintiff's "articles/publications were too short; they were works in progress; that she had not published in prestigious journals; that she had not published books."

(Defs.' Ex. 28 ¶ 5). Lindsay went on to point out, however, that plaintiff had co-authored publications with Dr. Carl Glickman and Dr. C. Thomas Holmes, both of whom had been granted tenure at UGA; stating that it was contrary to logic to view these publications favorably for the two (white) men while not viewing them favorably for plaintiff. (*Id.* ¶ 6). Neither Lindsay or plaintiff, however, provided the dossiers of Glickman and Holmes for a comparison of scholarly publications.

The only dossier provided by plaintiff for comparison to her own was that of Roberts. A review of the two individuals' dossiers reflects that plaintiff has published three more book chapters than Roberts, while Roberts has published eleven more articles than plaintiff. Additional comparison is made difficult by the fact that the individuals have published different types of materials. Naturally, the Court can only compare the quantity, and not the quality of scholarly works published by the two individuals, and it is the quality of the work that appears to be at issue in this case.

After careful consideration of all the evidence, the Court finds that plaintiff has failed to raise a genuine factual issue regarding pretext. *See Evans v. McClain of Ga., Inc.*, 131 F.3d 957, 964-65 (11th Cir. 1997) (citing *Combs v. Plantation Patterns*, 106 F.3d 1519, 1530-32 (11th Cir. 1997)). Statements made by Lindsay and Pajak demonstrate their opinion that plaintiff was qualified for tenure. However, neither individual disputes that other faculty members disagreed with that assessment. Plaintiff has provided no evidence of any sort which would create an inference of racial

animus on the part of any of the decision-makers affecting her tenure status.[12] *See Zahorik v. Cornell University,* 729 F.2d 85, 93-94 (2nd Cir. 1984) ; *see also Megill v. Board of Regents,* 541 F.2d 1073, 1079 (5th Cir. 1976). The Court recognizes that plaintiff and six of the faculty members disagreed with the majority of the faculty who decided that she was undeserving of tenure; however, the question is not whether it was reasonable to disagree with the employment decision, but whether the decision was based on discriminatory motives. *Combs,* 106 F.3d at 1543; *accord Holifield,* 115 F.3d at 1565.

In this case, plaintiff has failed to discredit defendant's nondiscriminatory reasons for its action. Therefore, as plaintiff failed to satisfy her ultimate burden of demonstrating the existence of an issue of fact as to whether the employer's decision was actually motivated by racially discriminatory intent, it is recommended that summary judgment be GRANTED as to this claim. *See Burdine,* 450 U.S. at 256 (stating that the plaintiff's burden of demonstrating pretext "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination").

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12. This would include the tenure committee, the appeals committee, and the university president. The Court acknowledges that plaintiff presented a hearsay statement alleging that Dean Buccino had requested a re-vote on Roberts in order to put her credentials up against plaintiff's which would, impliedly, make plaintiff's credentials less appealing. (Pl.'s Br. at 16; Pl.'s Ex. T). Plaintiff contends that this demonstrates discriminatory motive on the part of Buccino. This information is not useful in resolving this issue: it is inadmissable hearsay, and plaintiff produced no evidence indicating that Buccino had any input into the 1992 and 1993 tenure votes.

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2. Sex Discrimination Claim

Much of the analysis presented above is equally applicable to plaintiff's claim of discrimination based on sex; however, defendants have provided alternative arguments and plaintiff has presented additional evidence related to gender discrimination that must be addressed.

Defendants reassert that plaintiff cannot establish a prima facie case because she has failed to demonstrate that she was treated differently from similarly situated individuals. Specifically, because the only individual plaintiff compared herself to was Roberts, a female, comparison to Roberts provides no support for plaintiff's sex discrimination claim. In fact, defendants contend that the grant of tenure to Roberts demonstrates that UGA does not discriminate on the basis of gender.

Plaintiff once again relies upon statistical evidence to support her claim, and contends that women were grossly under-represented within her department and at UGA as a whole. She also asserts that a disproportionate number of female applicants were denied tenure during the years 1990-1995. Plaintiff's evidence shows that fifty-nine faculty members were considered for tenure within the College of Education during the years 1990 through 1995 (thirty-four men and twenty-five women). (Pl.'s Ex. N). Of the fifty-nine, fifty-two were granted tenure, twenty of whom were female.[13] Of the seven individuals denied tenure, five were women.

13. Plaintiff states that the numbers are 43 considered, 38 granted, and 14 granted were women. However, the Court's own (Cont'd)

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The bare statistics undisputedly show that a disproportionate percentage of those denied tenure were women.[14] Standing alone, however, these percentages are not sufficient to establish a prima facie case or even to give rise to an inference of discrimination. *See Hawkins,* 883 F.2d at 985; *Kilao v. Bowman Transp., Inc,* 789 F.2d 859, 874 (11th Cir. 1986). As with the statistics supplied in relation to the race claim, plaintiff failed to produce any evidence regarding the unsuccessful applicants' qualifications, or any information reflecting the overall pool of qualified individuals (regardless of whether they applied for tenure or not). *See Walson,* 487 U.S. at 996-97; *Hawkins,* 883 F.3d at 985. In fact, the Court notes that two of the females denied tenure received no affirmative votes whatsoever, and another female received only one affirmative vote, suggesting an independent nondiscrimninatory basis for denying tenure to these three individuals.

(Cont'd)
review of exhibit N shows the numbers to be 58 considered (not including plaintiff), 52 granted, and 20 granted were women. In addition, plaintiff did not include herself anywhere on the list. The Court can only speculate that plaintiff's exhibit is accurate even though the numbers presented in her brief were not.

14. Women made up 42.37% of the applicants but constituted 71.4% of those denied. However, the relatively small sample diminishes any significance of these numbers. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339-40 & n.20 (1977) (citing *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 620-21 (1974). In addition, plaintiff presented no expert testimony or regression analysis to support her arguments that these numbers are statistically significant.

Taken as a whole and in context, plaintiff's statistics fail to demonstrate a discriminatory pattern or practice, and she presented no similarly situated male as a comparator. Therefore, this Court concludes that, on this record, plaintiff has failed to establish a prima facie case of sex discrimination.

Even if the Court were to find that plaintiff could establish a prima facie case, defendants would still be entitled to summary judgment, based upon the legitimate nondiscriminatory reasons given for denying tenure to plaintiff. The Court previously found that plaintiff failed to demonstrate the existence of a genuine issue of fact as to pretext, and she presented no additional evidence in relation to her sex claim that would change that finding.

Accordingly, it is recommended that summary judgment be GRANTED as to plaintiff's claim of sex discrimination.[15]

C. *Plaintiff's State Law Claim*

Generally, "when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of

15. Plaintiff's introduction of statistics and general allegations of an institutional-wide practice suggest a disparate impact claim, although the Complaint itself nowhere specifically alleges disparate impact as a basis for recovery. As discussed above, however, plaintiff's statistics are incomplete and are unsupported by expert opinion analysis, and as such they do not provide a sufficient basis for such a claim, if plaintiff intended to assert one. Based on this record, this Court concludes that disparate impact is not a theory presented in this case.

jurisdiction" and dismiss the state claims as well. *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 (1988); *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966). *See also Eubanks v. Gerwen,* 40 F.3d 1157, 1161-62 (11th Cir. 1994); *Baggett v. First Nat'l Bank of Gainesville,* 117 F.3d 1342, 1353 (11th Cir. 1997); *Eubanks v. Gerwen,* 40 F.3d 1157, 1161-62 (11th Cir. 1994).

Georgia law allows an action that has been involuntarily dismissed by a federal court with no determination on the merits to be re-filed within six months of the dismissal; therefore, it appears that the statute of limitations will not bar plaintiff from utilizing the state courts to re-file the pendent state claims. O.C.G.A. § 9-2-61 (1996). *See, e.g., Sample v. Schuller Int'l,* 836 F. Supp. 876, 882 (S.D. Ga. 1993); *Ingle v. Specialty Distribution Co.,* 681 F. Supp. 1556, 1561-62 (N.D. Ga. 1988). Therefore, it is recommended that plaintiff's state law claims be DISMISSED without prejudice.

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IV.

Conclusion

In summary, it is recommended that all defendants be GRANTED summary judgment as to plaintiff's race and sex discrimination claims under Title VII. It is further recommended that plaintiff's state law claims be DISMISSED without prejudice.

SO REPORTED AND RECOMMENDED this 2d day of March, 1999.

s/ E. Clayton Scofield III
E. CLAYTON SCOFIELD III
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JUNE 13, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10988-11

THERESA M. BEY,

Plaintiff-Appellant,

versus

THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, STEPHEN PORTCH, et al.,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: ANDERSON, Chief Judge, WILSON, Circuit Judge, and HILL, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

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Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX E — EXCERPTS FROM THE UNIVERSITY OF GEORGIA, GUIDELINES FOR APPOINTMENT, PROMOTION AND TENURE, REVISED 1988

Excerpts from the 1988 Guidelines

Also known as the Blue Book

The University of Georgia
Guidelines for Appointment, Promotion and Tenure
Revised 1988

CONTRIBUTIONS TO RESEARCH OR OTHER CREATIVE ACTIVITIES

> 1988 Page 12, (2nd Paragraph) Section title — The Standard Faculty whose work assignments include research or other creative activities should clearly demonstrate excellence in these endeavors. It is important to emphasize the distinction between routine production and creative excellence as adjudged by the candidates' peers at the University of Georgia and elsewhere.

PROMOTION/TENURE ADVISEMENT (Annual Review)

> 1988 Page 28, (5th Paragraph) Section title — Advisement About Promotion Every instructor, assistant professor, and associate professor should have an annual review of his or her progress toward promotion. This should be done in conjunction with the annual review of all faculty members.